UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ASSOCIATION OF CONTRACTING PLUMBERS OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

v. 23 Civ. 11292 (RA)

CITY OF NEW YORK,

Oral Argument

Defendant.

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New York, N.Y.
March 13, 2025
11:00 a.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

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CITY OF NEW YORK
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(Case called)

MR. BARAN: Good morning, your Honor. Brian Baran for plaintiffs along with my colleague, Sarah Jorgensen.

THE COURT: Good morning.

MR. HARNED: Good morning, your Honor. Christian Harned for the City of New York along with Alice Baker.

THE COURT: Good morning. I'll ask everyone, and I'll do the same, to speak into the microphone because it can be difficult to hear in this courtroom.

We are here for oral argument on defendant's motion to dismiss. I have, of course, reviewed your papers, but why don't we start with defendant?

MR. HARNED: Thank you, your Honor.

The complaint here fails to state a plausible claim. It must be dismissed because the theory of the preemption that it relies on was incompatible with the text from the section of the statute that Congress wrote. That statute is, of course, the Energy Policy and Conservation Act, or EPCA.

The preemptive scope of EPCA is appliance efficiency regime, which are the relevant portions of the statute for this complaint, are equal in scope to its regulatory regime. So I'd like to start by briefing describing EPCA's --

THE COURT: Just bring your microphone a little bit closer. Thank you.

MR. HARNED: Sure. Is this better, your Honor?

THE COURT: Yes. Thank you.

MR. HARNED: So, as I said, I'd like to briefly start by describing EPCA's regulatory regime. EPCA regulates appliance efficiency in three key ways by imposing regulations on manufacturers. First, EPCA requires that manufacturers design their products to comply with energy conservation standards. These are standards that regulate the energy efficiency or energy use of covered products by imposing limits on their consumption of energy. I will refer to those standards as either appliance efficiency standards or key conservation standards interchangeably.

THE COURT: Sure.

MR. HARNED: The second obligation EPCA imposes on manufacturers is with regards to testing. Manufacturers must test their products in accordance with test procedures promulgated by the Department of Energy in order to measure the amount of energy that clients will use during the representative average-use cycle or period of use and to ensure those products comply with the energy conservation standards that the Department of Energy promulgates.

Third, your Honor, EPCA obligates manufacturers to label their appliances to state the amount of energy the consumer can expect that appliance to use during a typical-use cycle. Manufacturers must comply with all of these obligations before they may market their appliance, before a consumer ever

can purchase their appliance. And in exchange for their compliance with these obligations, EPCA preempts state or local regulations in those same three areas.

Here, your Honor, there can be no real dispute about whether Local Law 154, the law that is challenged by the complaint, regulates within those three areas. It plainly does not. It does not impose an appliance efficiency standard. It does not impose a labeling requirement. It does not impose a test procedure requirement on manufacturers.

Instead what Local Law 154 does is it prohibits the use of the certain fuel sources in new construction in New York City. And the effect of that is that for new buildings constructed subject to the requirements of the law, and it is in fact with respect to some buildings now, you cannot have natural gas or any other fossil fuel in the building.

The complaint here relied on a candidly wrongly decided decision out of the Ninth Circuit. It asserts that one of EPCA's preemption provisions, located at 42 U.S.C. 6297(c), extends beyond compliance efficiency regulations to capture any regulation that prevents consumers from using federally regulated products. But we know, from looking at the text of the statute, that the preemption provision does not do this.

Your Honor, the preemption provision at issues states in relevant part that once the Department of Energy promulgates the appliance efficiency standard for a regulated product, no

state or local regulation concerning the energy efficiency or energy use of that covered product shall be effective with respect to that covered product. And the effect of that provision really turns on two key words in the provision which are "energy use."

Thankfully we don't have to guess what energy use means because Congress told us what they intended it to mean. The definition that Congress assigned to energy use is the quantity of energy directly consumed by consumer products at point of use determined in accordance with test procedures under 6293, the test procedures regime. Plaintiffs never use this definition of energy use. They don't use it in the complaint. They didn't use it in their opposition.

Instead, plaintiffs assign a different meaning to energy use, and they assign various definitions to it. But at base, their definition of energy use is the quantity of energy directly consumed by covered products at the place where those appliances are used. And on their reading of that definition of energy use, they allege that Local Law 154 is preempted because it prevents appliance use, the use of certain appliances that are regulated by EPCA.

We know that their rewritten definition of energy use fails for a number of reasons. Many of them we address in our brief, your Honor, but I would like to focus on two key reasons here today. The first is that plaintiff's definition of energy

use will lead to absurd results under the statute if it is accepted by this Court. Energy use is only defined once in the statute. So it must have the same meaning in the preemption provision as it does in other provisions of EPCA's appliance regulatory regime.

Take, for instance, the labeling regime. EPCA's labeling regime requires that manufacturers again label their products for certain products like personal computers to state the energy use of that product. If energy use is the amount of energy that consumers use when they actually use the product, you could not label an appliance to state its energy use before you market it, because you will not know how any consumer will use their product and they haven't used the product. Energy use in that context hasn't existed yet, right.

The same is true for EPCA's test procedure regime. A test procedure is a test that measures energy use during a representative average use cycle or period of use. If energy use, as plaintiffs allege here, is the energy that consumers use when they use an appliance, you couldn't possibly test a product's energy use before it's marketed. Again, a consumer hasn't used the product, so they haven't generated this measure of energy use that plaintiffs say energy use is defined as.

Finding that plaintiff's rewritten definition of energy use is true would lead to absurd results under the statute because it would necessarily require you to find that

Congress imposed obligations on factors that it couldn't satisfy. It required them to know how each consumer will use their covered product and how much energy each consumer will consume when they use their product before that product ever reaches manufacturers, but we know that's not true. If you use the statutory definition, the definition of energy use that Congress wrote, energy use is the same for a product that is purchased and used on a daily basis as one that is never purchased and never used. They have the exact same measure of energy use under the statute.

Your Honor, the second key reason that we know energy use is not the quantity of energy that consumers use when they use the product is because EPCA contains a provision that directly tells us that energy use is different from the energy consumed and the definitions of actual use. That provision is 42 U.S.C. 6297(g). In that provision, Congress protected manufacturers from claims that the energy use that they state on their label is different from the energy use that would be achieved under conditions of actual use. If Congress intended for energy use to mean the energy achieved under conditions of actual use, they would not have needed to protect manufacturers from these claims. Your Honor, plaintiff's theory of preemption requires that their definition of energy use be true. Again, that's how they reach the conclusion that 6297(c) preempts regulations that prevent the use of a given appliance.

However, for the reasons that we discussed here and as further stated in our brief, we know that energy use does not have the meaning that they have assigned it. Instead, it has the meaning that Congress gave it. Because their theory of preemption relies on this definition of energy use, their theory of preemption fails, and the complaint must be dismissed.

Unless your Honor has further questions, I'll reserve the remainder of my time.

THE COURT: Why don't we wait until rebuttal? Thanks.

MR. BARAN: Your Honor --

THE COURT: Please, after you. Go ahead.

MR. BARAN: This case is not about how energy use is measured. I think you can accept everything the city says about how to measure energy use and still find that this is a regulation concerning the energy use of a covered product. My friend on the other side said that the key words are energy use, but the key word is actually concerning. That term has a well established scope when Congress uses it in preemption provisions. It means the same thing as related to and --

THE COURT: Walk me through that, what exactly the definition of concerning is. In your view, it is the same as related to?

MR. BARAN: Yes. It's the same as related to. The Supreme Court said that in *Lamar, Archer & Cofrin*. And I think

when Congress uses "regulation concerning," you could swap in "related to" there, and it would mean the same thing. So I think the simplest place to look is to the many, many cases about "related to" that apply the test originally developed for ERISA about "reference to" or "connection with." And this case fits squarely within the "connection with" strain of that text, and I think that's where you find the limiting principle.

We've heard a lot in the briefing about how we don't have a limiting principle. The limiting principle is there in the many cases on preemption provisions that Congress structured in just this way. And those don't -- you've got Justice Scalia's point about how, to the curbstone philosopher, everything is related to everything else. That's, of course, not the scope of concerning. The question is, you know, among other things: Is there a significant impact on what Congress was trying to do? Here the answer is yes. Congress wanted to prevent a patchwork of conflicting requirements for federally regulated appliances, and allowing states and local governments to ban covered appliances would create exactly the patchwork that Congress was trying to prevent.

By contrast, an incidental impound -- there's several examples in Judge Baker's concurrence in the Ninth Circuit of general regulations that incidentally impact how much energy an appliance used. Those are unlikely to be preempted under the well-established meaning of concerning.

THE COURT: Aren't regulations prohibiting the use of certain types of fuels in appliances in certain settings commonplace in the realm of municipal construction and fire codes? How is this different from that?

MR. BARAN: I think this is different from your sort of typical fire or electric code——I think there was an example in the brief of 12 amps on a 15-amp circuit——because this a categorical ban on any appliance in any situation in the covered buildings that uses a particular fuel. And Congress told us that it cared about preserving choice among appliances. It wanted to increase efficiency, but it also wanted to preserve choice among appliances. That's why 6295(q)(1) requires the department to set standards differently based on the fuel types. Because otherwise a standard might not achieve as much as it could if it has to bring all the other fuels with it, or it will be set to high for a particular fuel to be used.

Congress could have taken a different approach. It could have said, pursue efficiency at all costs even if that means making some fuel types unavailable, but Congress decided not to do that. It prohibited the department from doing that, and it prohibited the department from allowing waivers from preemption that would let states and local governments do that. So I think Congress was concerned about preserving consumer choice among the appliances that it decided to regulate, and that was a choice that was within Congress's power to make and

to enforce on state and local governments.

I think things like your more typical fire or electrical code, those coexisted with EPCA for a long time. And I think if we're talking about, you know, you can't put a furnace if it is too big for the room, I think that's fundamentally different from what the city has done here, which has said that effectively any gas or fuel-oil appliance that has an energy use value calculated under the statute that exceeds zero can't be used because the fuels necessary to use it, the fuels that the way its energy use works are prohibited in new buildings. And I think it's exactly the same result as if the city had expressly set an energy-use cap on all of the affected appliances of zero. And I think even under the city's reading of the statute, it couldn't do that because that would be setting an energy conservation standard. And so, it can't do indirectly what it can't do directly.

THE COURT: Can you respond to Mr. Harned's analysis of just the statutory language? And then, I also want to talk about legislative history as well.

MR. BARAN: Do you mean the statutory language of energy use specifically or just more generally?

THE COURT: I mean EPCA and then the Local Law 154 as well.

MR. BARAN: So I think for EPCA, you know, we agree that energy use is a value that you can calculate for an

appliance. That's a value that gets stuck on a label. But I think the core question here is: What does the preemption provision preempt? And Congress was free to and it did preempt more than what it decided the federal government was going to do. All the federal government does, under this section of EPCA, is sets standards for appliances. I think Congress preempted more than that, and it told us so because it says: No state regulation concerning the energy use of a covered appliance.

And so, I don't any there's any way to read "concerning," given the backdrop of that term from the "related to" cases from the many similar preemption provisions to just reach regulations that are effectively the same thing as an energy conservation standard or that require recalculation of the energy use value for a particular appliance. I think it also sweeps in regulations that effectively require that gas appliances with energy use greater than zero can't be used. You couldn't impose that regulation on the manufacturer. You can't impose it on the consumer. And I think the provision that --

THE COURT: Wasn't the purpose of EPCA to avoid these conflicting state standards?

MR. BARAN: Yes, that was. One of the core things that Congress wanted to accomplish was one of the core purposes of this preemption provision. It's --

THE COURT: That's because it would be difficult for manufacturers to have different standards that comply with all these different state laws. That's not really what's happening here, right? This isn't going to burden manufacturers in the way that it was intended by EPCA.

MR. BARAN: I disagree.

So I agree that once a manufacturer decides, okay, I'm building a gas appliance, the city's law has nothing more to say about how that gas appliance is built, but manufacturers have to make decisions about before that; what appliances are we going to offer with what fuel sources. And if you have a patchwork of cities where one city is all electric, one city is all gas, manufacturers are absolutely going to have to account for that, especially with populous cities and states, a national patchwork of which fuels, which appliances within their lines can be marketed and sold in which jurisdictions, that's going to affect how you allocate your space in the factory, how you tool your factory floor.

So I think even on the view that preemption stops at the end of the factory floor, which I don't think is consistent with the statute and particularly is inconsistent with the statutory exceptions, I think we still win under that view because this does affect manufacturers decisions. It just affects them one step earlier when they're choosing the fuel that the appliance is going to use, rather than, okay, I've

made that initial choice, and then designing the rest of the appliance.

THE COURT: Can you address counsel's position about the language regarding testing?

MR. BARAN: I think the language regarding testing actually favors our view because the point of the test and the way the tests are required to be designed is to measure a representative use cycle. So I think that reflects that Congress was concerned with the real-world impact of what it was doing rather than just how things work and allowed. And so, I don't think there's any way to read the preemption provision such that it only preempts things that require you to retest the statute -- I'm sorry -- to retest an appliance.

So, yes, we don't repeat it every time we say the definition, but I don't think that's because we're trying to hide from the test procedures. I think that's because it explains how to calculate energy use, but this case isn't really about how to calculate energy use. We accept everything the city says about how to calculate energy use, and it's still preempted because it's still a regulation concerning energy use.

I think the exceptions really help expose that the city's interpretation is too narrow. The very thing that enables you to satisfy the building code exception disqualifies a regulation from preemption on the city's version of the

statute. What I haven't seen either in the city's brief or any of the amicus briefs, or frankly any of the briefing in the Ninth Circuit, is an example of the regulation that could satisfy all seven of the requirements of the building code exception, but would otherwise be preempted on an interpretation of the provision that doesn't preempt laws like New York City's. And if the things that --

THE COURT: Say that one more time. I have a transcript here, but just say that one more time.

MR. BARAN: My point is that Congress put in this seven-part exception, so it must have thought that a law that meets all these requirements should be exempt from preemption. But if it didn't put in this exception, it would otherwise be covered by the scope of preemption provision. So if what it takes to satisfy the exception means that there's just no preemption in the first place under your interpretation, then that interpretation of the general preemption provision must be wrong. Congress wouldn't have written this whole exception to be surplusage.

THE COURT: All right. I have a couple questions. So in your complaint, you're urging that the Court adopt the rationale set forth by the Ninth Circuit, which focused on the term "point of use," to conclude that EPCA preempts regulations that interfere with consumer's ability to use the covered products. But if I read your opposition brief correctly, you

don't seem to be still making that argument but are arguing instead that Local Law 154 essentially sets the maximum energy use for gas appliance at zero, so I just want to make sure I'm clear on what your position is.

MR. BARAN: I think you can take any of the views that have been offered of what "point of use" does in the definition and still get to where we are because I think our argument is really about concerning. It's not about point of use. And I think the Ninth Circuit understood that to reinforce among the other things in the statute that Congress cared about more than what happens on the factory floor. But even if you read it the way Judge Friedland's dissent does, and you understand it to mean all it is is site versus source energy, which you measure, I think we'd get to the same place. Because what is preempted is more than just things that affect the energy use number or an energy efficiency number for the appliance. I think here, this is just -- what the City has done is just a roundabout way of imposing a zero-energy use standard on all the affected appliances, which are gas and fuel oil appliances.

I think one of the disputes in the Ninth Circuit between the panel and the dissent from the denial, and I think what we also heard a little bit today is this idea that there's some unconstrained consumer right to use. I don't think that's what the Ninth Circuit panel did. I think it was making a much narrower point that when preemption kicks in, of course

consumers are going to be able to use the products as a result of bans on those products being preempted, but I don't think that means that it's a totally constrained right to use, free of all regulations, free of fire codes, free of electrical codes and all of that.

I think these things that incidentally affect how you might be able to use a particular appliance in a particular building are fundamentally different from what the City has done here, which is a categorical ban on whole swaths of covered appliances, and just not do it in the terms that I think we all agree would be expressly preempted, which is gas appliances maximum energy use is zero.

THE COURT: All right. So when Section 6297 refers to a covered product, does that mean the broad categories of products listed in Section 6292, which makes no mention of fuel source? For example, that section covers kitchen ranges and ovens but does not differentiate between gas and electric. And so, my question is: Would a gas kitchen range and an electric kitchen range be two different covered products or are they the same covered products?

MR. BARAN: I think they are types or classes of covered products. The way it works is that there's this list of kinds of appliances that are covered. The Department of Energy can also and has designated a whole bunch more appliances that are on the statutory list as covered

appliances. There's a process in the statute by which it can do so. And then, when it actually sets the standards, it is required to set them by fuel type, and that's 6295(q)(1). It sets different standards for each fuel type.

Actually, Congress did that in the statute as well where it was setting standards. For example, I believe 6295(e)(1). You can see that in the statute there are separate standards for water heaters by fuel type. So a gas water heater and electric water heater are both types of covered products.

THE COURT: Could New York City limit the amount of hours per day, for example, that individuals could use gas stoves?

MR. BARAN: I think it's unlikely. Assuming that we're talking about otherwise available gas, I think it is unlikely that New York City would be able to impose that kind of limit partly because, Where do you draw the line? Can you use it for a minute a day? That starts to look like a ban. I think it would depend on the particular circumstances of the case. Like, what are the things we see, especially in the ERISA cases. That's gone up to the Supreme Court how many times, and it's because preemption provisions like these are really hard to draw right lines especially when you are sort of in the heartland of preemption versus on a case that is actually preventing the boundary. But I think in general, it

sounds like it would likely be preempted as just another way of getting to the same thing it's doing here.

THE COURT: All right. Anything else?

MR. BARAN: I guess I think I would just leave you with I don't think there's any reason to create a split with the Ninth Circuit, and I don't think the City's reading or any of the amicus readings fully account for all of the statutory context and especially the building code exception. I really think that if there is no regulation that would be preempted but for the exception, then that just can't be the right interpretation of the statute. Our interpretation gives meaning to all the parts of the statute. The City's does not. Thank you, your Honor.

THE COURT: Thanks. One other question I'm going to ask both of you: Are there any factual issues you think need to be decided before I can rule?

MR. BARAN: I don't think so.

THE COURT: All right. Thank you. Rebuttal?

MR. HARNED: Thank you, your Honor. I'd like to address three points that my adversary raised. First and briefly, Local Law 154 is not an appliance ban. Plainly, by its text, it does not ban appliances. Natural gas appliances are being bought and sold in the city today. That will continue to be true in perpetuity under Local Law 154.

What Local Law 154 does is limit where you might use a

covered product, and what it does is limits their use to older building stock. You cannot install fossil fuel in new buildings, and as a result of that, you cannot use appliances that rely on fossil fuel. It's plainly not an appliance ban.

Second, your Honor, Local Law 154 only concerns the energy use of covered products if you adopt their rewritten definition of energy use. Under their definition, a regulation concerns energy use if it prevents you from using energy, but that's not the definition that Congress wrote. And the definition that Congress wrote -- excuse me -- that the plaintiffs here have asserted again is fundamentally incompatible with the statute.

THE COURT: So walk me through the definition of "concerning."

MR. HARNED: Your Honor, we can accept as true that concerning has the meaning that my adversary gave it; that it means related to. In this context what that means is that New York City could not directly or indirectly regulate in the manner that EPCA does by establishing an appliance efficiency standard. A direct regulation might be one that is imposed directly on manufacturers. You must produce products that achieve X level of efficiency. An indirect regulation can come in many forms. It can be a regulation that is imposed on consumers. You cannot purchase products unless they comply with this efficiency standard. It can be a building code. You

cannot satisfy our building code unless the building achieves a certain level of efficient use of energy.

Local Law 154 plainly does not do either of those things. It does not require that any manufacturer have their product use energy more efficiently than it did before Local Law 154. Instead it says you cannot use a given type of fuel. That is not the regulation that concerns energy use if you apply the definition of energy use that Congress wrote.

Your Honor, an example here might be helpful to really explain just how far plaintiff's theory of preemption goes. My colleague mentioned boilers. Under their theory if a locality were to say you cannot use a boiler of X size in a space that is too small for its safe use, that would be preempted because you are preventing that boiler's use. You are preventing that boiler from using energy in certain spaces, right. Plainly though, that standard would not impose an appliance efficiency standard on the boiler that requires it to consume energy more efficiently. Under Congress's definition of energy use, that safety standard wouldn't be preempted. Under their theory, of course, it would be.

Your Honor, briefly I'd like to address this idea that Congress intended to preserve choice by limiting the federal government's authority to establish standards that would result in the unavailability of products. All of those provisions arise under 6295, which is the provision governing energy

conservation standards; the very types of standards that we say Congress sought to preempt states and localities from doing. And Congress, of course, said sure we don't want you to establish a standard that makes certain covered products unavailable in the market. And then when you look at the preemption provision, if you are seeking a waiver of preemption from the Department of Energy, they cannot grant that if the state or local appliance efficiency standard has the same effect.

That Congress does not want standards to result in the unavailability of products says nothing about regulations like Local Law 154 that are not appliance efficiency standards. You can go back to the boiler example. We can come up with other examples, but it is plainly the case that states and localities have the authority to regulate where appliances might be used, and that they can do that without regulating the efficiency of that appliance -- without imposing an appliance efficiency standard.

THE COURT: Can you address plaintiff's argument that Local Law 154 sets the energy-use standard to zero?

MR. HARNED: It doesn't. There's no energy-use standard if you apply energy use as the definition that Congress gave it. Of course, if you use their definition where the use of energy is effectively the definition of energy use, it would limit the use of energy in some context. But if you

apply Congress's definition, we're not requiring that manufacturers redesign their products to consume zero natural gas. That's not the case. Again, any natural gas appliance that could be sold before the effective date of Local Law 154 may still be sold in the City today. Of course, they are being sold. You can still go to PC Richards & Sons and buy whatever gas stove you would like to buy.

THE COURT: But it wouldn't be able to be used in --

MR. HARNED: In new construction, correct. But the regulation on where appliances are used is not an appliance efficiency standard. What we're saying is what Local Law 154 says is that you cannot use certain fuel types. Those fuel types are fuel types, which according to the energy information agency, emit above the threshold of emissions that New York City has determined are acceptable.

The preemption provision says nothing about regulations. It does not say you cannot prohibit -- that a state or local jurisdiction can not promulgate a regulation that prohibits certain fuel types. It is expressly cabined to energy use, which again has a specific meaning under the statute, meaning that plainly pertains to appliance efficiency standards and does not pertain to appliance use as plaintiff's theory requires.

THE COURT: Do you think the purpose of Local Law 154 is relevant here?

MR. HARNED: No, your Honor. I think what's relevant is the mechanism. Though the purpose of Local Law 154 is to improve air quality to address climate change, there's nothing to indicate that in fact we were trying to ensure natural gas appliances more efficiently used their natural gas. We don't. There's nothing in the law that would require that.

THE COURT: And I asked this of your adversary, but are there any factual issues you think need to be decided?

MR. HARNED: Your Honor, I don't -- I'm sorry, your Honor.

THE COURT: No. Go ahead.

MR. HARNED: I don't think so, but I would highlight Local Law 154 will limit where you might be able to use certain appliances. It is plainly not an appliance ban as they assert it to be.

THE COURT: All right. Thank you for your excellent advocacy. I will try and rule shortly. Have a good day. And please get a copy of the transcript from the court reporter.

(Adjourned)

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